United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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P/S

United States Court of Appeals

For the Second Circuit.

NARROWS PROMOTIONS, LTD. d/b/a
ELITE DELI,

Plaintiff-Appellant,

-against-

HARTFORD INSURANCE COMPANY,

Defendant-Appellee.

On Appeal From the District Court of the
United States For The Eastern District of New York

APPELLANT'S BRIEF UPON APPEAL

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BRIEF OF PLAINTIFF-APPELLANT

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BRIEF OF PLAINTIFF-APPELLANT

The Issues Presented For Review

1. Does an equivocal contingent "Notice of Cancellation" of an insurance policy satisfy the statutory and contractual requirement of notice of termination?

2. When a "Notice of Cancellation" of an insurance policy is prepared by one individual, inserted into an envelope

by another individual, and mailed by still another individual, does a break in the chain of custody operate as a fatal defect in proof of mailing?

3. Is an insurance company estopped from claiming that a policy was cancelled by inconsistent activities such as continuing to bill for earned premiums?

4. If a "Notice of Cancellation" becomes effective 35 days after receipt, when does it become effective if there is uncontroverted testimony of non-receipt?

5. Does a copy of a Notice of Cancellation, alleged to have been previously sent, addressed to a major stockholder, satisfy the requirement of a Notice of Cancellation to a corporation?

STATEMENT OF THE CASE

This is an appeal by Narrows Promotions, Ltd. d/b/a Elite Deli ("Narrows") from a final judgment entered on April 25th, 1974 (App. 251a) in the United States District Court for the Eastern District of New York pursuant to an opinion by the Honorable John R. Bartels, sitting without a jury, entered after trial on April 24th, 1974 (App. 238a) dismissing the complaint on the merits in favor of defendant Hartford Insurance Company ("Hartford").

STATEMENT OF THE FACTS

On October 24th, 1971, a fire occurred on the premises of Narrows Promotions, Ltd. d/b/a Elite Deli at 2100 Richmond Road, Staten Island, New York. Narrows operated a delicatessen on the premises and was insured by the Hartford Insurance Company against fire in the amount of $96,000.00. This action for the face amount of the fire insurance policy was originally instituted in the New York State Supreme Court but was removed to the United States District Court for the Southern District of New York by Hartford pursuant to 28 U.S.C. Section 1332.

Hartford denied liability upon the policy on the ground that it was cancelled for default in payment of premium by a written notice mailed to Narrows in accordance with the policy provisions, prior to the date of the fire. Narrows denied it ever received such notice and accordingly a full evidentiary hearing was had before the Honorable John R. Bartels, sitting without a jury with respect to this limited issue.

At this hearing, it was conceded that Narrows is a New York corporation with its principal place of business at 2100 Richmond Road, Staten Island, New York and that Hartford

is a Connecticut corporation duly licensed by the Superintendent of Insurance of the State of New York. Hartford acknowledged that it issued insurance policy No. 17-SMP-101960, insuring Narrows' premises against any loss due to fire, among other perils, for a period of three years commencing July 25th, 1970, with a maximum loss coverage or limitation of liability of $96,000.00, for a three-year premium of $8,307.00, payable $2,769.00 at inception and $2,769.00 at each anniversary thereafter. Accordingly, the cost of this fire insurance coverage comes to $230.75 per month.

Narrows and Hartford then entered into a separate agreement, referred to as a Premium Finance Note and Agreement, for the payment of the first year's premium of $2,769.00, whereby Narrows paid a cash down payment of $553.80 and financed the remainder of $2,215.20 together with the finance charge of $73.86, aggregating a total of $2,289.06, which it agreed to pay in nine monthly installments of $254.34. Thereupon this note was discounted with Chemical Bank. The note provided on the back thereof that in case of default in payment of any monthly installment, the unpaid balance of indebtedness would become immediately due and payable without notice, and that such default would result in the cancellation of the policy.

The fire insurance policy permitted Hartford to cancel the policy at any time "by giving the insured a ten days' written notice of cancellation."

Narrows paid eight of the nine monthly installments to Chemical Bank. Narrows claimed to have paid the ninth and final installment but Hartford denies receipt of same. No witness from Chemical Bank, the receiving agent for Hartford, testified.

Accordingly, if Hartford is to be believed, Narrows would have paid the initial down payment of $553.80 and eight monthly installments of $254.34 or an aggregate of $2,588.52. The cost for the first year's insurance coverage is $2,769.00 plus $73.86 in finance charges or a total cost of $2,842.86. Therefore, the pro rata earned premium would have been due in 305 days, at the effective date of its final notice, or $2,313.82 plus $73.86 finance charge or a total of $2,387.68, leaving a pro rata rebate due to the insured of $200.84.

Testimony was adduced at the hearing that Hartford's Anna Rossi, a Superviser of the Premium Finance Department located at 123 Williams Street, New York, New York, gave her subordinate, Theresa Moran, Narrows' file and instructed her to send a written "Acknowledgement of Cancellation" notice to Narrows. This notice states: "We have no alternative but to acknowledge your cancellation of each such policy as of June 1, 1971" The notice also includes an extensive offer to reinstate the insurance coverage upon receipt of the payment claimed past due, and states: "If this payment has been mailed, please disregard this notice."

Hartford's Theresa Moran, on or about May 17th, 1971, typed the fill-in spaces in a blank "Acknowledgement of Cancellation" form for Narrows. This form is actually a four-page carbon-interleaf form permitting one typing to complete four separate sheets of paper. The first page is usually mailed to the insured, the second to the producer (broker), and the remaining two sheets are retained by Hartford. Moran thereupon inserted the first page "ribbon copy" into a righthand window envelope so that the name and address of Narrows showed through the window. The fact that Mrs. Moran used a righthand window envelope is significant because Hartford also uses special lefthand window envelopes so that forms typed once may be separated and mailed to separate addresses.

As indicated by Hartford's copy of the "Acknowledgement of Cancellation" form, the date of the notice is May 17th, 1974.

After inserting the original "Acknowledgement of Cancellation" into the window envelope, Theresa Moran typed the name and address of Narrows on a postal manifest containing the names and addresses of other parties to whom the Premium Finance Department sent mail on May 17th, 1971.

The chain of custody of the notice breaks at this point. Hartford claims either Theresa Moran or Anna Rossi delivered the mail listed on the postal manifest and the postal

manifest itself to an "unknown" mailboy on May 17th, 1971.

Mr. Thompson testified that the usual procedure at that time was to carry the mail and postal manifest to the eleventh floor mailroom of the 123 Williams Street office and although he would not compare the envelopes with the entries on the postal manifest, he would count the envelopes, compare the same with the total numbers of entries on the postal manifest and usually find the totals to be equal. Mr. Thompson would thereupon insert this total in the space provided on the postal manifest. It is significant to note, however, that Mr. Thompson denies knowledge of the identity of the particular mailboy on the day in question.

According to the testimony of Hartford's Thompson, the usual procedure would be for the mailboy to place postage on each envelope to be mailed and also affix postage on the post office manifest equivalent to 5 cents for each envelope. Thereafter, the mailboy would wrap the envelopes in the postal manifest and deliver them to the postal clerk at the Church Street Station Post Office, New York, New York, in a valise. Usual procedure would dictate that the postal clerk, in the presence of the mailboy, would count the number of envelopes delivered to him and insert this figure in the appropriate box in the lower lefthand corner of the postal manifest.

The postal clerk would then initial and stamp the postal manifest acknowledging receipt of the items listed thereon.

Usual procedure, apparently, does not dictate that the postal clerk would check each letter in order to verify that it is listed correctly on the manifest or conversely that each manifest entry is reflected correctly on each envelope.

After his visit to the post office, the mailboy would return the postal manifest so marked and initialed to the Premium Finance Department of Hartford at the 123 Williams Street office.

Thereafter, and on July 12th or July 13th of 1971, Jonathan Pons, one of Hartford's underwriters, sent to Hartford's Policy Writing Department a document referred to as a Cancellation Worksheet which ordered that "Direct Notice of Cancellation" be sent with respect to Narrows' insurance policy. On July 13th, 1971, the Cancellation Worksheet along with a copy of Narrows' fire insurance policy and a Notice of Cancellation form, were received by Hartford's Rose Vierno, a superviser of the Policy Writing Department located at 175 Remsen Street, Brooklyn, New York. Rose Vierno thereupon matched up the policy number on the worksheet with the number on Narrows' insurance policy and delivered the Cancellation Worksheet, the insurance policy itself and a Notice of Cancellation form to an unidentified typist.

The Notice of Cancellation form consists of a snap-apart carbon-interleaved form designed so one typing produces a mortgagee's copy, an insured's copy, a company copy, a producer's copy, a

file copy and two certificates of mailing. Each page is separated by carbon paper. Referring to defendant's exhibit "J" appearing on page 28 of the exhibit book, one can readily see that the name and address of the insured appear on the righthand side of the form and the name and address of the mortgagee appear on the lefthand side. This design, along with the appropriate certificates of mailing, are planned so that the insured's copy would go into a righthand window envelope for mailing and the mortgagee's copy would go into a lefthand window envelope for mailing yielding certificates of mailing for each document. Obviously, the correct envelope must be used for the correct addressee to receive his copy. This unknown typist creates the first break in the chain of custody of the second notice. The second break in custody of the second notice arises out of the fact that after the Notice of Cancellation is completed by the unknown typist, it is delivered to an unknown assemblier who allegedly checks to make sure that the form was correctly completed before placing the documents in the appropriately windowed envelope. The unknown assemblier would attach a certificate of mailing to each envelope (the insured's and the mortgagee's envelope) by paper clip.

The second Notice of Cancellation is dated July 13th, 1971 and states that Narrows' insurance policy is cancelled effective "35 days after the receipt of the notice."

The third break in the chain of custody of this purported second Notice of Cancellation arises when an unidentified mailboy collects all of the Notices of Cancellations with attached Certificates of Mailing completed by the Policy Department and brings them to the mailroom where each Certificate of Mailing and the envelopes are passed through a postage metering machine resulting in the mailboy taking possession of one pile of envelopes and one pile of Certificates of Mailing. The Certificates of Mailing and the envelopes are thereafter transported to Cadman Plaza Post Office, Brooklyn, New York and delivered to a postal clerk. Here too, the postal clerk checks that there is one envelope for each Certificate of Mailing and cancels the postage affixed to the Certificates of Mailing, without verifying the correctness of the name and address on the envelope or the Certificate of Mailing. The Certificates of Mailing, after being stamped by the postal service, are then returned to the Policywriting Department.

The preparation of the forms, the envelopes, the Certificates of Mailing, the postage metering, and delivery to the post office of the envelopes and Certificates of Mailing were done by employees of Hartford whom Hartford could not identify and who did not testify at the hearing.

Accordingly, the purported first Notice of Cancellation which was equivocal in nature (i.e. it states that the Notice

should be ignored if payment has been made in offering to reinstate policy coverage) had one break in the chain of custody. The purported second Notice of Cancellation had three breaks in the chain of custody.

Of course, the first Notice of Cancellation shows that the cancellation is effective on June 1st, 1971 and the second Notice of Cancellation shows that the cancellation is effective 35 days after receipt of this notice. It is interesting to note that on the Hartford file copy of the first notice, which shows cancellation effective as of June 1st, 1971, there is a notation "Will call back 6/15/71. If no call back cancel 6/21/71. O.K. to canc. as per agent 6/29/71." This is in accordance with the second notice, which vitiates the first notice, and shows cancellation at a much later date.

The importance of the break in the chain of custody of the purported second Notice of Cancellation is emphasized by the fact that the mortgagee, First National City Bank, failed to receive its copy of the Notice of Cancellation (Appendix at page 167a et sec.) not withstanding the fact that Hartford claimed to have sent such notice to the mortgagee as a carbon copy of the same snap-out form which was used in sending notice to Narrows and that Hartford produced the same type of Certificate of Mailing for First National City Bank as it has produced for Narrows. One can only conjecture of the numerous possibilities which could result in such a happenstance. One such possibility would be that

the notice to First National City Bank was placed in a righthanded envelope and the notice to Narrows Promotions, Ltd. was placed in a lefthanded envelope. Such a happenstance would not result in the notice to each being delivered to the other because the name and address of Narrows is higher on the form than the name and address of First National City Bank, and accordingly, two envelopes would be mailed with no addressee showing through the window. Hartford's claim that no documents were ever returned to it from the Post Office Department is not persuasive because we are unable to ascertain the return address on the window envelopes and further, no evidence was adduced at the trial as to who would receive the return of mail to Hartford at each office.

Mr. Charles D. Benway, the successor Insurance Broker to Mr. John L. Piazza, the broker who originally wrote the policy, claimed to have sent to Narrows another duplicate copy of the second Notice of Termination. Mr. Benway, himself a defendant in an errors and omissions action by Narrows, issued what can best be described as a self-serving statement which could be interpreted as a attempt to extricate himself from the delimna of failing to place this fire insurance coverage with the New York Property Insurance Underwriting Association as mandated by law and suggested in the Hartford Notice of Termination itself (Defendant's Exhibit M in evidence).

Obviously, if Mr. Benway had not written his now famous disclaimer letter, he would be defenseless in the errors and

omissions action pending against him.

Assuming termination of the insurance coverage as stated in the second Notice of Termination, as explained previously, Narrows as the insured would be entitled to a pro rata rebate due to it of $200.84. However, defendant's Exhibit C in evidence shows that Hartford considered that it owed Narrows no rebate and in fact continued to bill Narrows for the final payment, $254.34, as being owed to Hartford for insurance. Such billing is also reflected in defendant's Exhibit D in evidence in which it threatens litigation against Narrows should it fail to pay Hartford "the earned premium" of $254.34. These letters, which are defense exhibits, tend to prove rather conclusively that the insurance coverage did not terminate on August 18th, 1971, but continued after that date. In effect, Hartford wishes to have its cake and eat it too. It collects and claims for earned premium for a period of time subsequent to its purported termination date, while simultaneously declining liability for a loss which occurred during the period of time it was earning premiums.

The final balance statement issued by Hartford is dated September 28th, 1971, long after the purported termination date of August 18th, 1971. In this final balance statement, Hartford continues to request premiums for a period subsequent to the termination date.

In defense Exhibit D in evidence, a letter from Hartford dated October 12th, 1971 to Narrows, Hartford continues its request, or be it demand, for earned premium subsequent to its purported

termination date. The actions of Hartford are such as to operate inequitably estopping Hartford from claiming on one hand that its coverage terminated on August 18th, 1971 while continuing to be paid for such coverage subsequent to that date.

POINT I

A NOTICE OF CANCELLATION OF AN INSURANCE POLICY MUST BE CLEAR, UNEQUIVOCAL AND NON-CONTINGENT.

The insurance policy contains a cancellation clause which provides that:

> "This policy may be cancelled at any time by this Company by giving to the insured a five days' written notice of cancellation with or without tender of the excess of premium paid above the pro rata premium for the expired time, which excess, if not tendered, shall be refunded on demand." (Page 2, Line 60-65 Semi. See, also, Section 168 of the insurance law of the State of New York).

The words "five days" in the above cancellation clause were deleted and the words "ten days" substituted therefore.

In Rose Inn Corporation v. National Union Insurance Company, 133 Misc. 440, reversed on other grounds, 229 A.D. 349, affirmed 258 N.Y. 51, the Court held out page 444:

> "The method of cancellation prescribed in the policy must be strictly followed. The insured must have actual notice of cancellation or such a situation must be brought about as to put him on inquiry which, if made, would result in actual notice."

The purported Notice of Cancellation is defendant's Exhibit B in evidence, appearing at page 14 in the Exhibit book. This purported Notice of Cancellation contains to the left of the name and address of the insured the following statement:

"If this payment has been mailed, please disregard this notice."

On the bottom of the front of the said notice is the statement:

"Important: See reverse side of this acknowledgement."

The reverse side of the document contains a heading "Offer to Reinstate" followed by the following paragraphs:

"The Company designated as Payee in the Note and Agreement referred to on the front of this form offers to arrange for reinstatement of the policy or policies designated in Schedule A of such Note and Agreement without lapse, and for continuance of the method of payment set forth in such Note and Agreement as it relates to all policies scheduled -- provided.

The overdue payment shown on the front of this notice is received in the enclosed self-addressed envelope on or before the cancellation date stated on the front of this notice.

Make your check or money order payable as set forth in the Coupon Book or Coupon Envelope (previously furnished you) and bearing the same Account Number as that shown on the face of this notice.

Do not mail currency or stamps."

It has been held that strict compliance with requirements of policy cancellation clause must be observed by the party seeking to terminate an insurance contract prematurely (National Factors, Incorporated v. Waters, 48U Misc. 2nd 822, 249 N.Y.S. 2nd 121).

To cancel a policy of insurance, the insurer must comply with the requirement of the policy and give notice to the insured of its election to cancel the insurance contract; and although, in the absence of statutory or contractual provisions, no particular form of notice is required, such notice must be definite and unequivocally show a cancellation which will take effect at once or at the expiration of a period certain named in a notice:

> New York Cent. Employees, etc. v. Commercial Credit Co., 13 Misc. 2nd Date 74, 178 N.Y.S. 2nd 977.
>
> B & B Trucking v. Home F. & M. Ins. Co., 125 Misc. 312, 209 N.Y.S. 211, aff. 216 A.D. 710, 214 N.Y.S. 812, aff. 243 N.Y. 558, 154 N.E. 604.
>
> Casper v. Great Am. Indem. Co., 277 A.D. 1127, 101 N.Y.S. 2nd 158.

The principle that underlies the decision that a party is precluded from destroying existing contract rights except upon a strict observance of the provisions contained in the contract itself or the statute, and that in the absence of waiver or estoppel a notice of cancellation to the insured must be clear, unconditional, and unequivocal (Van Tassel v. Greenwich Ins. Co., 151 N.Y. 130, 45 N.E. 365; Van Valkenburg v. Lenox F. Ins. Co., 51 N.Y. 465). It follows that the notice is not sufficient if it is equivocal or merely states a desire or intention to cancel (Griffey v. New York Cent. Ins. Co., 100 N.Y. 417, 3 N.E. 309). A somewhat casual statement by a

burglary insurer's inspector as to the necessity for alterations in the premises cannot take the place of a definite notice to which the insured is entitled as a condition precedent to the cancellation of a binder (Josephs v. Alberti, C. & Co., 225 A.D. 115, 232 N.Y.S. 168, aff. per curian 251 N.Y. 580, 168 N.E. 434). Sufficient notice could be a letter to the insured that the policy is "hereby cancelled for nonpayment of premium," and that the cancellation will take effect as of a certain date since it provides for a clear unequivocal notice (Mord v. Hartford A. & Indem. Co., 245 N.Y. 278, 157 N.E.138).

Accordingly, an equivocal contingent "Notice of Cancellation" of an insurance policy cannot possibly satisfy statutory or contractual requirement of notice of termination. Therefore, the first "Notice of Termination" upon which Hartford relies is insufficient as a matter of law (Exhibit Book at page 15).

POINT II

THE PURPORTED THIRD NOTICE OF CANCELLATION BY THE BENWAY AGENCY IS LEGALLY INSUFFICIENT; THE NOTICE WAS DIRECTED TO A CORPORATE OFFICER AND NOT TO THE INSURED.

In order to constitute effective notice to cancel a policy, it must be served on or given to a proper person and, generally speaking, notice of cancellation to the insured or to someone who is his agent to receive such notice is required (Van Loan v. Farmers' Mut. Fire Ins. Asso., 90 N.Y. 280).

Accordingly, since an agency to procure insurance is ended when the policy is procured and delivered to the principal, the agent has no power, after the policy is so delivered, to consent to a cancellation or to accept notice of an intended cancellation by the insurer (Hermann v. Niagara F. Ins. Co., 100 N.Y. 411), and this principle applies not withstanding a provision in the policy that any person other than the insured who may have procured the insurance shall be deemed to be the agent of the insured and not of the insurer in any transactions relating to the insurance (Hermann v. Niagara F. Ins. Co., 100 N.Y. 411). Similarly, a statutory requirement that notice be given the insured is not satisfied by giving notice to a club to which the accident policy in question was issued but which insured is members to whom the benefits were directly payable (Grossman v. London G. & Acci. Ins. Co., 124 Misc. 520, 208 N.Y.S. 582).

Accordingly, strict adherance to the method of cancellation prescribed in the policy must be followed and notice must be given to the insured only (Rose N. Corporation v. National Union Insurance Company, 133 Misc. 440, Reversed on other grounds 229 A.D. 349, Aff. 258 N.Y. 51 at page 444).

The purported third Notice of Termination was in the form of a letter by insurance broker Charles D. Benway dated July 27th, 1971, which was addressed to Mr. Joseph DeFranco at Elite Deli (Defendants Exhibit N in evidence appearing at page 38 in the Exhibit Book). Obviously, Mr. DeFranco is not the insured and it so happens his first name is Robert. Such a purported Notice of Termination accordingly was sent to a party other than the insured (albeit a principal of the insured) and therefore is defective as a matter of law.

POINT III

THE BREAK IN THE CHAIN OF CUSTODY OF THE SECOND "NOTICE OF CANCELLATION" OPERATES AS A FATAL DEFECT IN THE PROOF OF MAILING.

As a general rule, a Notice of Cancellation mailed by the insurer does not become effective until it is received, and receipt by the insured of such notice is a condition precedent to a valid cancellation of the policy (Hughes v. Royal Indem., 165 N.Y.S. 530). However, a special provision in the insurance policy that mailing of the cancellation is sufficient to cause cancellation is binding on the insured and in such case the actual receipt of notice by the insured need not be shown although non-receipt becomes an evidentiary factor on the issue as to whether or not the notice was in fact mailed (Schaefer v. Fidelity & Casualty Co., 203 Misc. 633,123 N.Y.S. 2nd 787; Byard v. Royal Indem. Co., 39 N.Y.S. 2nd 60). If by the terms of the policy notice may be mailed to the insured "at the premises as stated" mailing is sufficient providing notice is properly addressed, but to comply with such requirement the address must follow the description of the location of the property "as stated" in the policy; at least, to the extent that it would be likely to reach the insured (Hughes v. Royal Indem. Co. Op Cit).

While it would be a simple case to prove mailing if the testimony were that a particular individual prepared a notice, placed it in an envelope and mailed it to the insured, this is

not the case of the statement of facts given here. Here we have one individual preparing the notice, another placing it in an envelope, and still another mailing it, with lapse in the chain of custody. It is elementary that the proper preparation of forms, envelopes, cancellation notices, acknowledgements of cancellations, Certificates of Mailing, postal manifests as well as the proper addressing, postage metering and subsequent delivering of same to a postal clerk in a post office may be established by testimony, such testimony must include all those participating in such actio that such action was taken that such action was taken in the regular course of business, and that it was the regular course of business to take such action (United States Ex Rel. Helmecke v. Rice, 281 FED, 326,331; William Gardan and Son v. Batterson, 198 N.Y. 175, 91 N.E. 371; Aetna Insurance Co. v. Millard, 25 A.D. 2nd 341, 343, 269 N.Y.S. 2nd 588, 590; Haak v. Brost Motors Inc., 69 Misc. 2nd 820, 331 N.Y.S. 2nd 329; Lerner v. Travelers Insurance Co., 27 Misc. 2nd 815, 819-21, 212 N.Y.S. 2nd 770, 775-776; Allstate Insurance Co. v. Altman, 21 Misc. 2nd 162, 168, 191 N.Y.S. 2nd 270, 277. See Boyce v. National Commercial Bank & Trust Co., 41 Misc. 2nd 1071, 1075, 247 N.Y.S. 2nd 521, 525, aff. 22 A.D. 2nd, 848, 254 N.Y.S. 2nd 127; Teichberg v. D. H. Blair and Co., 63 Misc. 2nd 1073, 314 N.Y.S. 2nd 284. But see Caprino v. Nationwide Mutual Insurance Co., 34 A.D. 2nd 522, 308 N.Y.S. 2nd 624. See also Capri v.

Lumbermen's Mutual Casualty Co., 352 N.Y.S. 2nd 58).

Such a conclusion is obviously not reachable when all of those participating in such action have not testified!

The burden of proof, clearly upon the insurer, that if it has cancelled the fire insurance policy cannot be met when the insurer fails to affirmatively prove that the Notice of Cancellation was sent to the insured.

POINT IV

THE NOTICE OF CANCELLATION UPON WHICH THE DEFENDANT RELIES, THE SECOND NOTICE OF CANCELLATION, HAS YET TO BECOME EFFECTIVE; IT BECOMES EFFECTIVE 35 DAYS AFTER RECEIPT AND NOT AFTER MAILING.

While it is clearly true that the method of cancellation precribed in the policy must be strictly followed (Rose Inn Corporation v. National Union Corporation, Op Cit), and while it is also true that a special provision in an insurance policy that mailing of a cancellation is sufficient to cause cancellation is binding on the insured and that in such case the actual receipt of the notice by the insured need not be shown (Schaefer v. Fidelity & Casualty Co, Op Cit), the insurer has waived such provision in its purported second Notice of Cancellation.

The insurer's purported second Notice of Cancellation is its July 13th, 1971 notice constituting defendant's Exhibit K in evidence which appears on page 35 of the Exhibit Book. In the space providing for the date of cancellation, the said notice clearly states "Thirty-five (35) days after receipt of this notice." Accordingly, if the insurer had inserted a date in that space, the provision in the insurance policy that mailing of the cancellation was sufficient to cause cancellation would be binding on the insured and in such case the actual receipt of the

notice by the insured need not be shown. However, by not filling in a date set, the insurer has specified that the effective date of cancellation is not calculated by any method other than from date of receipt.'

Accordingly, not only must mailing now be shown, but receipt must be proven so as to established the true effective date of cancellation.

POINT V

BY VIRTUE OF THE INCONSISTENT POSITIONS ADOPTED BY THE INSURER, THE INSURER IS EQUITABLY ESTOPPED FROM CLAIMING THAT THE POLICY WAS CANCELLED.

Narrows claims to have paid the last payment to Hartford's receiving agent, Chemical Bank. While Hartford claims not to have received this last payment, no witness from Chemical Bank testified in the Court below.

However, not withstanding the aforesaid, if Hartford is to be believed, Narrows would have paid the initial down-payment of $553.80 and eight monthly installments of $254.34 or aggregate of $2,588.52. The cost of the first year's insurance coverage is $2,769.00 plus $73.86 in finance charges for a total cost of $2,842.86. Therefore, the pro rata earned premium would have been due for 305 days or $2,313.82 plus $73.86 finance charge for a total of $2,387.68, leaving a pro rata rebate due to the insured (assuming nonpayment of the last premium) of $200.84.

However, Hartford made a claim against Narrows for $254.34 on September 28th, 1971 (Defendant's Exhibit C in evidence appearing in the Exhibit Book at page 14). This last payment of $254.34 would have enriched Hartford by that sum plus the $200.34 unearned premium which would have been due to Narrows. Not only did Hartford demand by a bill this additional sum of $254.34, consistent with continuing the insurance coverage, but it also sent a letter dated October 12th, 1971 to Narrows threatening suit if payment is not made. This letter of October

12th, 1971 by Hartford to Narrows constitutes the defendant's Exhibit D in evidence appearing in the Exhibit Book at page 19.

Note that if the insurance was cancelled as claimed by Hartford, at this point, October 12th, 1971, Hartford would owe Narrows $200.84. However, if the insurance was to have been continued, Narrows would owe Hartford the sum of $254.34 as per Hartford's letter to Narrows dated October 12th.

These inconsistent positions operate to equitably estop Hartford from claiming that the coverage had been terminated.

The Doctrine of Equitable Estoppel or Estoppel in Pais is based in general upon the theory that a person shall not be permitted to change a position, once assumed by him by word or conduct, for the purpose of enforcing rights asserted by him, where enforcement will result to the prejudice of another who has acted in reliance upon such word or conduct in a position assumed thereby. Parties are estopped to deny the reality of the state of things which they have made appear to exist, in applying which others have been made to rely (Western New York & P.R. Co. v. Rea, 83A.D. 576, 81 N.Y.S. 1093; People Ex Rel. McGoldrick v. Riggs, 200 Misc. 313, 107 N.Y.S. 2nd 623; Mann v. Anderson, 20 F Supp. 643). Where one, by his action or conduct, has estopped himself from the assertion of a right, that right, for the purpose of a particular action, has ceased to exist (Bygland v. Goufe, 134 N.Y.S. 2nd 328, aff. 285 A.D. 1077, 141

N.Y.S. 2nd 503). Estoppel is created by a conclusive admission, one which could not be denied (Hopwood Plays v. Kemper, 263 N.Y. 380) or revoked (Public Service Mut. Ins. Co. v. Hudson Properties Inc., 15 Misc. 2nd 963, 182 N.Y.S. 2nd 710). There are situations where a person will not be permitted to occupy inconsistent positions or to take a position in regard to a matter which is directly contrary to, and inconsistent with, one previously assumed (Rothschild v. Title Guarantee & T. Co., 204 N.Y. 458, 97 N.E. 879). The rule that where a party by his conduct has induced another to act in a particular manner, he will not afterward be permitted to take a position inconsistent with such conduct, if the consequence would be toward an injury to such person or to someone claiming under him (Williams v. Whittel, 69 A.D. 340, 74 N.Y.S. 820). This principle operates to preclude one who prevents a thing from being done from availing himself of the non-performance which he has himself occasioned. Also, one enjoying rights is estopped from repudiating that the dependent conditions and obligations which he has assumed (Kin v. Edward B. Marks Music Corp., 34 N.Y.S. 2nd 628). A principal contractor who accepted the work of a subcontractor, submitted it as a compliance with the contract, obtained the architect's certificate of the completion of the principal contract, and receipt of the contract price therefor, is said to be estopped from contending that the subcontract had not been performed (See N.Y. Jur. Contracts, Section 310). Similarly,

one who has secured a license to produce a play in moving pictures, and has acted under it, cannot be heard to impeach his licensor's title (Hart v. Fox, 166 N.Y.S. 793). A party cannot by his words cancel a contract and then continue to assert rights and benefits under it (Brennan v. National Equitable Indest. Co., 247 N.Y. 496, 160 N.Y. 924).

In the case at bar, it is claimed, if Hartford is to be believed, that Hartford has cancelled its insurance contract with Narrows and that such cancellation prevents Narrows from collecting pursuant to the policy and then Hartford continues to assert rights and benefits in the form of a receipt of premiums under the policy. If this matter were to go to trial, Narrows could affirmatively plead and prove that not only did Hartford assert the right to the money, but Hartford sued Narrows for the premium and collected. Inconsistent positions in litigation and agreements and stipulations severing litigation would also operate to equitable estop Hartford from now, after receiving payment for the coverage, adopting the inconsistent position that had cancelled the policy.

There is no way that Hartford can by words cancel the insurance contract and then continue to assert rights and collect premiums therefore (Brennan v. National Equitable Indest. Co., Op Cit).

CONCLUSION

Hartford's first Notice of Cancellation of the insurance policy is insufficient as a matter of law because it is equivocal and contingent. Hartford's second purported Notice of Cancellation was not received by the insured and there is insufficient proof to show that it was ever mailed. Hartford's second Notice of Cancellation claims to be effective 35 days after receipt and accordingly proof of mailing is insufficient because proof of receipt is required to show the effective date of the termination of insurance. The purported third Notice of Cancellation is inadequate as a matter of law because it was not addressed to the insured.

Not withstanding all of the aforesaid, and assuming that there were three valid Notices of Cancellation sent by Hartford to Narrows, Hartford is equitably estopped from asserting cancellation of the policy because it adopted the inconsistent position of collection insurance premiums subsequent to the purported or alleged termination date.

The decision and judgment of the lower Court should be reversed as a matter of law and judgment should be entered in favor of the plaintiff-appellant for the relief requested in the complaint.

Respectfully submitted,

John L. Piazza,
Attorney for the Plaintiff-Appellant

New York, New York
September 11th, 1974

AFFIDAVIT OF SERVICE

State of New York)
City of New York : ss.:
County of New York)

A. JUNE VICKERS, being duly sworn, according to law, deposes and says:

1. That deponent is not a party to the action, is over 18 years of age, and resides in the city, county and state of New York.

2. That on the 11th day of September, 1974, deponent served the within Appellant's Brief upon Messrs. Greenhill & Speyer, attorneys for the defendant-appellee in this action, at 56 Pine Street, New York, New York 10005, the address designated by said attorneys for that purpose by depositing a true copy of same enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the city, county, and state of New York.

A. June Vickers

A. JUNE VICKERS

Sworn to before me this
11th day of September, 1974

HERMAN A. STUHL
Notary Public, State of New York
No. 31-9230450
Qualified in New York County
Commission Expires March 30, 1975